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IN THE

Supreme Court of the United States

October Term, 1970

No. 121 3

JOSEPH F. SCHIPANI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Joseph P. Schipani, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, hereinafter described.

Opinions Below

The opinion of the Court of Appeals, printed in the appendix hereto, *infra*, is not yet reported. The "Memorandum and Order" (opinion) of the District Court (E.D. N.Y., Weinstein, J.), printed in the Appendix hereto, *infra*, is reported in 315 F. Supp. [illegible].

Both of the above mentioned opinions relate to certain sentencing issues which are the subject matter of this petition for certiorari. There have been several prior "opinions below" in this case which, insofar as pertinent to the within certiorari proceeding, will be cited at appropriate places *infra*.

Jurisdiction

The judgment of the Court of Appeals affirming a District Court order as to legality of petitioner's sentence was entered on December 16, 1970. Both Courts below have treated the within proceeding on the issue of legality of sentence as being appealable. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. In this income tax prosecution, was it violative of due process of law, equal protection of the laws, the privilege against self-incrimination, the search and seizure restrictions, the right to assistance of counsel, and the constitutionally reserved right of privacy, for the sentencing judge to impose a jail term which that judge himself characterized as "far longer than would be expected in a routine tax case", where such exceptionally severe sentence was expressly stated by the judge as being based on unconstitutionally obtained electronic evidence which had been suppressed at trial and which allegedly depicted the petitioner as a "professional criminal"?

2. Is Fourth Amendment "deterrence" of unconstitutional police over-zeal the only, or the dispositive, constitutional policy consideration in applying the exclusionary rule against the fruits of unconstitutional electronic surveillance; or does the exclusionary rule also vindicate the individual right of privacy against governmental lawlessness?

3. Even if the Fourth Amendment "deterrence" rationale is valid by itself alone (without the "privacy" element), can the "deterrence" rationale be rationally applied in this case, where the trial prosecutors have contended throughout that their proofs against petitioner under the indictment have never derived from any of the tainted elec-

truly "material"? Can petitioner and prosecutors be said to have been "deterred" by suppression at trial of tainted electronic information when they insist they never used or relied on the tainted information? Is not the sentencing stage in this particular case the first time in the case when Fourth Amendment "deterrence" can come into operation as a practical reality?

4. Should the instant sentence be vacated and remanded for correction as "an illegal sentence", pursuant to Rule 35 of the Federal Rules of Criminal Procedure?

Constitutional Provisions and Statutes Involved

The case involves the Fourth and Ninth Amendments (search and seizure, and privacy), the Fifth Amendment (due process and self-incrimination), and the Sixth Amendment (right of counsel and confrontation) of the United States Constitution. It also involves Rule 35, F.R.Cr.P. (illegal sentence).

Statement of the Case

Petitioner seeks review of a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Eastern District of New York (Weinstein, J.), which denied a motion under Rule 35, F.R.Cr.P. This Rule 35 motion had commenced as a motion for reduction of sentence, but there emerged a question of whether the sentence sought to be reduced was "illegal" within the meaning of Rule 35.

Judge Weinstein formulated the question of illegality of the sentence as follows:

> "• • • in imposing sentence may the Court consider facts and inferences drawn from illegally obtained evidence suppressed at trial? • • •

> "In deciding upon a sentence the Court considered data introduced at the hearing on the motion to suppress but excluded at the trial. Illegal wiretapping* of conversations involving the defendant and his associates established that the defendant was a criminal figure and that his undeclared income was the proceeds of organized crime. * * *
>
> * * * * *
>
> "* * * The jail term was far longer than would be expected in a routine tax case. * * * A primary reason for severity was the court's conclusion that the defendant was a 'professional criminal'. * * *" (Appendix hereto *infra*, pp. 7A-8A).

Judge Weinstein concluded "that in some cases, including this one, such evidence may be utilized in sentencing" (*id.*, p. 7A), and that "no useful purpose would be served by exclusion in this case" (*id.*, p. 19A).

In affirming Judge Weinstein's order as to legality of the sentence, the Court of Appeals stated the "single issue" as follows:—"Is it proper for a Judge in deciding upon a sentence to use evidence which has been excluded from trial because it was obtained in violation of the Fourth Amendment." (*id.*, p. 2A).

Both courts below reasoned the Fourth Amendment-electronics-suppression-sentencing issue as being controlled by the consideration of police "deterrence" (*id.*, *passim*). The Court of Appeals said (*id.*, p. 4A):

> "The purpose of the exclusionary rule is, of course, to discourage unconstitutional acts by law enforcement officials, Mapp v. Ohio, 367 U.S. 643 (1961). The issue here is whether the exclusionary rule ought to be extended to include sentencing procedures.

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*We note that the case involved not "illegal wiretapping" but trespassory room "bugging".

> "We believe that applying the exclusionary rule for a second time at sentencing after having already applied it once at the trial itself would not add in any significant way to the deterrent effect of the rule. It is quite unlikely that law enforcement officials conduct illegal electronic auditing to build up an inventory of information for sentencing purposes, although the evidence would be inadmissible on the issue of guilt."

Other points in the reasoning of the courts below are noted under our "Reasons for Granting the Writ", *infra*.

While this certiorari proceeding arises solely on an issue of legality of sentence, the prior trial and appellate history of the case needs to be summarized:—

This is an income tax prosecution, under an indictment charging five counts of personal income tax evasion through failure to file returns for the years 1956-1960, in violation of 26 U.S.C. § 7201. (As recited *infra*, the case has previously twice been before this Court on petitions for certiorari.)

The trial before Judge Weinstein (sitting without a jury), in which the within claimedly illegal sentence was imposed, was the second trial under this indictment, as the first-trial conviction (Judge Rosling without a jury) was vacated by this Court on grounds of electronic taint (*infra*). In this second trial before Judge Weinstein the petitioner was sentenced to three years concurrently on each of the five counts plus a committed fine of $2,500.00 on each count for a total of $12,500.00. This is the sentence which Judge Weinstein characterized (*supra*) as imposing a "jail term * * * far longer than would be expected in a routine tax case."

The above mentioned first-trial conviction by Judge Rosling was affirmed in *United States* v. *Schipani*, 362 F.2d

823 (C.A. 2, 1966); this Court's *per curiam* order vacating that conviction, on grounds of electronic taint, is reported as *Schipani* v. *United States*, 385 U.S. 372, decided December 12, 1966, No. 594, October Term, 1966.*

After this Court's vacating of the first-trial conviction on grounds of electronic taint in December 1966, the Government moved before Judge Weinstein to retry petitioner on untainted evidence.

In the first trial, before Judge Rosling, there had been no issue of electronic taint. The electronic issue emerged for the first time at the Solicitor General level when the first trial conviction reached this Court on petition for certiorari in No. 594, October Term 1966. That is, apparently the prosecutive officials in the first trial had not been aware of any electronic taint in the case, and it was only at the certiorari stage of the first trial that the electronic taint came to attention.

Both in the first and second trials the Government relied on the net worth theory. Under the familiar *Holland-Massei*** principle, the Government may establish its net-worth showing on the element of proof of taxable income, either by proving "likely source" of income or by negating "all possible" non-taxable sources. In both of the within trials of Schipani the Government offered proof of "likely source".

The offered proofs of "likely source" in the first trial included proof that Schipani had an interest in a restaurant business, performed services as a go-between in labor relations of employers with unions, *and had income from*

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* Judge Rosling's opinion, unreported, is printed in the separately bound printed "Appendix to Petition for a Writ of Certiorari" in the above cited No. 594, October Term 1966, in this Court.

** *Holland* v. *United States*, 348 U.S. 121; *United States* v. *Massei*, 355 U.S. 595.

illegal activities. Judge Rosling accepted the restaurant and labor relations proofs, *but not the illegal activities proofs.*

Judge Rosling's first-trial acceptance of the restaurant and labor relations proofs was based on direct testimony of live witnesses, not on any electronic proof—see Judge Rosling's unreported opinion in our separately printed "Appendix to Petition for a Writ of Certiorari" in No. 504, October Term, 1966, in this Court, at pp. A-29, A-49 to A-56. Judge Rosling's rejection of the illegal activity proofs of "likely source" was based on his conclusion that this proof, consisting of alleged pre-indictment admissions by Schipani to Government agents in a casual conversation, lacked sufficient probative quality (*id.*, A-29, A-56).

Thus, we repeat, all proof of "likely source" offered by the Government in the first trial was offered without any indication of the electronic feature lurking in the case. And indeed in the subsequent (second-trial) suppression proceedings before Judge Weinstein the Government unequivocally asserted that its representatives in the first trial had had no knowledge of any electronic background in the investigation of the case.

As above noted, in the first trial before Judge Rosling the Government had offered "likely source" proofs of restaurant, labor relations and illegal income. In the electronic-suppression proceedings before Judge Weinstein the Government strenuously urged that all of those first-trial proofs should be received because they were free of electronic taint, i.e., they either derived from pre-electronic investigation or from independent (non-electronic) sources (see, in the second trial, the Government's Memorandum Brief in Opposition to Motion to Suppress, pp. 5, 16-19). Above all, the Government in the second trial urged Judge Weinstein to accept its Exhibit 1, an elaborate chart by Internal Revenue Agent Masetti, which undertook to show,

item by item, that all of the first-trial proofs were free of electronic taint (*ibid*). Judge Weinstein, however, suppressed all proof of "likely source" as being either electronically tainted (*United States* v. *Schipani*, 289 F. Supp. 43 (E.D. N.Y. 1969)), or as being insufficiently probative (Memorandum and Order of October 14, 1968, unreported, set forth in the Appendix to the printed petition for certiorari in *Schipani* v. *United States*, No. 725, October Term 1969, at pp. 71a-73a).

Thus, in the second trial, before Judge Weinstein, exactly as in the first trial (Judge Rosling), the Government insisted that its case did not depend at all on any of the electronic activity.

The significance of this matter of the Government's unremitting insistence throughout this case, that all of its offered proofs at both trials were absolutely free of electronic taint, has been alluded to in our Question No. 3, *supra*, and is treated further under our "Reasons" *infra*. As we put it in Question No. 3, "How can policemen and prosecutors be said to have been 'deterred' by suppression at trial of tainted electronic information when they insist they never used or relied on the tainted information? Is not the sentencing stage in this particular case the first time in the case when Fourth Amendment 'deterrence' can come into operation as a practical reality?"

Resuming now our chronology of the prior trial and appeal history of this case—the history which precedes the instant sentencing that we claim is illegal on grounds of electronic taint:—Petitioner's conviction in the second trial (Judge Weinstein) was affirmed in *United States* v. *Schipani*, 414 F.2d 1262 (C.A. 2, 1969), *cert. denied*, 397 U.S. 922. Following the latter denial of certiorari, petitioner made his within Rule 35 motion before Judge Weinstein for reduction of sentence, during which motion proceedings there arose the present issue of legality of the

sentence on grounds of electronic taint. As already noted, Judge Weinstein's Memorandum and Order rejecting our claim of illegality of the sentence is printed in the Appendix hereto *infra*, and is reported in 315 F. Supp. 253; and the Court of Appeals' affirmance—the ruling here sought to be reviewed—is printed in the Appendix hereto *infra*.

Reasons for Granting the Writ

1. This case is of first impression at certiorari level. Apparently the Government did not seek certiorari in the analogous case of *Verdugo* v. *United States*, 402 F.2d 599 (C.A. 9, 1968). The question of the applicability of the Fourth Amendment exclusionary rule in federal sentencing proceedings may not have been a conspicuous question heretofore in the administration of federal criminal justice, but if the decision below is passed by without review by this Court, it is bound to have "sorcerer's apprentice" precedental impact.

2. In the light of *Katz* v. *United States*, 389 U.S. 347, 351-353, it is hard to understand the simplistic intonation of the Fourth Amendment "deterrence" idea by both of the Courts below. *Katz* breathes throughout the constitutional value of the right of *individual privacy* against unconstitutional electronic intrusion. Neither of the Courts below so much as mention this overriding theme of the constitutional right of privacy. Their entire reasoning begins and ends with the constitutionally more diminutive "deterrence" idea. Contrast Circuit Judge Browning's additional concurring opinion—he also wrote the majority opinion—in *Verdugo* v. *United States*, 402 F.2d 599, 616-617 (C.A. 9, 1968), collecting the authorities which support the "privacy" and the self-incrimination rationale of the Fourth Amendment exclusionary rule, as distinct from and additional to the "deterrence" rationale.

It is a truism that the great generalizations expressed in those parts of the United States Constitution which aim at drawing the line between governmental power and individual rights, require judicial interpretation or reinterpretation from time to time. "Inarticulate major premises" do unavoidably enter into this interpretative process, as we all know, and our wisest Judges strive continually to cope with their own "major premises" in carrying out the interpretative task. This judicial task entails, first, making the "premise" articulate, and, second, consciously choosing whether to read the "premise" explicity into the Constitution in a given situation. Even more challenging, are the situations where the "major premise" is *objectively* derivable from the Constitution itself, rather than being merely the *subjective* premise of a particular Judge. In these latter situations the Judge's task is to prefer, decisionally, the Framers' "premise" over his own. Above all in the Bill of Rights must the wise Judge seek and give effect to the Framers' "premises". A felicitous example of this last is the judicial pronouncement that our constitutional search and seizure provisions "did not confer a right upon the people. * * * The right guaranteed was a right already belonging to the people. It was a precautionary statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. * * * To view the amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon." *District of Columbia* v. *Little*, 178 F.2d 13, 17 (C.A.D.C., 1950), aff'd 339 U. S. 1.

In other words, it is not, in any particular instance, the right to be let alone in one's privacy which has to prove itself as against offered intrusion: it is, rather, the searcher's or demandant's intrusion which has to be shown to be justifiable as against the traditionally presumed "right of the people to be secure in their persons, houses, papers, and effects." U. S. Const. Amdt. IV.

In the reasoning of both of the Courts below in this case there is a "major premise" that has not been sufficiently articulated by either of those Courts. It is the premise that the Fourth Amendment exclusionary rule is somehow unpalatable, a thing of reluctant necessity; apply the exclusionary rule as parsimoniously as possible, both of the Courts below seem to be saying. For example, in citing *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161 (C.A. 2, 1970), the Court of Appeals in its opinion herein (Appendix *Infra*, p. 5A) was citing a case (*Sperling*) in which this revealing language had appeared (426 F.2d at 1163):

> • • • •
>
> "The exclusionary rule is believed to be a necessary restraint on the adversarial zeal of law enforcement officials. 'As it serves this function, the rule is a needed, but grudgingly taken, medicament: no more should be swallowed than is needed to combat the disease.' Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 389 (1964)."

This attitude of treating the exclusionary rule with reluctance is, in the language of *District of Columbia* v. *Little*, quoted *supra*, "to invert completely the true posture of rights and the limitations thereon" (178 F.2d at p. 17).

This brings us back to the above theme of the "deterrence" *versus* the "privacy" rationales of the Fourth Amendment exclusionary rule. The effective doctrinal instrument for cutting down the scope of the exclusionary rule, as exemplified in the instant case, has come to be abstemious "deterrence". As above noted, the "privacy" purpose of the Fourth Amendment is not even mentioned by either of the Courts below. A reader of the two opinions below, if he depended on those opinions for his entire instruction as to the purpose of the Fourth Amendment,

would never know that the Fourth Amendment has any concern with the individual right of privacy.

3. The sentencing Judge in this case (Judge Weinstein) concluded, as seen, that the trial-suppressed electronic information established Schipani's "professional criminal" character and that "his undeclared income was the proceeds of organized crime". And both of the Courts below emphasize that Schipani has not challenged the "accuracy" of the electronic information (Appendix *infra*, pp. 4A, 10A).

Here we have the critical *due process* impingement in this case—*i.e.*, a due process violation aggravating the Fourth Amendment violation. Under our system of law, criminal *punishment*, the actual *penal* laying-on of the hand of Government on a person, does not take place upon the mere bringing of a charge of crime: the actual punitive imposition on the accused person does not even take place, under our system, upon the rendering of a verdict of guilt. It takes place only upon the act of *judicial sentencing*. All of this is expressed in the axiom of appellate law that "the sentence is the judgment". And all of this is expressed in this Court's recognition of "the critical nature of sentencing in a criminal case" (*Mempa* v. *Rhay*, 389 U. S. 128, 134).

The conclusions of the Courts below as to the "facts" revealed about Schipani in the electronic information stand, on this record, as purely *ex parte* conclusions. Nor could it be otherwise in the setting of this litigation, for Schipani's position throughout has been that he stands on the presumption of innocence, introduced no defense proof, and rested on the insufficiency of the Government's "circumstantial evidence" case under the net worth method (see the Brief for Appellant in No. 33157 in the Court of Appeals at pp. 2-5, 37-39, 56-83). Schipani of course had and has the right thus to pitch his stand strictly on the presumption of innocence; and even questions as to the tactical wis-

dum or prudence of such a defense, tend to lose point in this type of case where the circumstantial evidence method of proving criminal guilt achieves high water mark thanks to the net worth theory of income tax prosecution (*Ibid.*). It almost borders on ill grace to expect of a defendant in such a case that, when faced with the use against him at sentencing of suppressed unconstitutional evidence, he should undertake to litigate the "accuracy" merits of such suppressed evidence. Such a defendant should surely be entitled, if only as an essential continuation of his presumption-of-innocence stand, to challenge the use of the suppressed unconstitutional evidence at sentencing on strictly constitutional exclusionary grounds. Surely such a defendant should not be disadvantaged by *ex parte* conclusions of the sentencing Judge regarding the tainted evidence whose "accuracy" has never been litigated—and should not need to be litigated.

In this very *ex parte* assertion of a judicial power to assess the constitutionally obnoxious electronic evidence, and in this very disadvantaging of the hapless defendant whose traditional protection of the presumption of innocence is thus over-ridden *ex parte*, is discernible, we submit, the ultimate vice of the doctrine laid down in the *de novo* reasoning and rulings of the Courts below.

Cf. Baker v. United States, 388 F.2d 931, 934 (CA 4, 1968), where the sentence was vacated with the words, "No conviction or criminal charge should be included in the [pre-sentence] report, or considered by the Court, unless referable to an official record". Was the electronic dossier on Schipani in this case "referable" to an "official record"?

4. Both of the Courts below distinguish *Verdugo v. United States*, 402 F.2d 599 (C.A. 9, 1968),* on the theory

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*See Scott v. United States, 419 F.2d 264, 266, N. 7 (App. D.C., 1969), citing *Verdugo* with approval.

that the unlawful search there was undertaken not to obtain evidence to support an indictment or conviction but to enhance the possibility of a heavier sentence after the basic investigation had been completed, whereas in our case, the Courts below say, "the evidence excluded at trial was gathered in a basic investigation of the defendant and a number of suspected members of an organized crime syndicate. *It was offered to support all of the counts of the indictment* * * *. It cannot be said that this information was gathered for any purpose other than the indictment and conviction of the defendant and his criminal associates, and it cannot be said that application of the exclusionary rule of sentencing in this and similar cases would have any appreciable deterrent effect" Appendix *infra*, 15A; and see *id.*, 4A, fn. 1) (Emphasis supplied.)

The Court will have noticed that much of our Statement of the Case, *supra*, deals with the Government's unvarying insistence that it never proffered, never intended to proffer, and for a long time never even knew of the existence of, any trial evidence that was or might be thought to be derived from electronic information.

Yet, both of the Courts below *decisionally* treat the Government's position as having been one which subjected the Government at all times to the hazard of a "deterrent" Fourth Amendment suppression order for purposes of trial: the Government has already, in the view of the Courts below, so to say expiated its full Fourth Amendment "deterrence" anguish, has drained the last drop of the bitter Fourth Amendment "deterrence" cup, and does not need any such further "deterrence" as would be involved in having the sentencing Judge ignore the suppressed electronic information for purposes of extra severity at the sentencing.

But, under the Government's own theory of this case, it never faced the "deterrence" hazard which the Courts below depict. The Government never professed to stand

on any prosecutorial right derived from excludable "search" evidence. The Government, on the contrary, was positive and emphatic throughout, that all of the proffered evidence at both trials came from sources totally independent of any electronic activity. That Judge Weinstein in the second trial nevertheless visited upon the Government a trial suppression order in regard to proofs of "illicit source", is not to be attributed to the Government's having "assumed a risk" of Fourth Amendment "deterrence".

Furthermore, how can it be said that the Government suffered any "deterrence" here, when, despite its massive electronic auditing—which caused the Solicitor General and this Court in 1966 to throw out Schipani's first conviction—the second conviction was sustained as "untainted". True, the second-trial proofs of "illicit source" were suppressed, but we hope we may be pardoned for wondering whether even this "deterrence" would have been ordered in this case if the case did not happen to be one which under the *Holland-Manzi* principle (*supra*), could be perfectly well salvaged for conviction under the net worth theory.

The only "deterrence" that has ever been realistically available in this case, looking at the case now in final retrospect, is the "deterrence" in the matter of the sentencing-electronic problem.

Should this Court now tolerate the orders of the Courts below in unleashing Government officials to do the kind of thing shown on the record of this case, here is what will predictably happen: Policemen everywhere will be irresistibly tempted to conduct illegal electronic auditing of reputed "professional criminals"—and of their "friends" and "contacts"—to build up an electronic "inventory" of inculpatory or tendentious "information" which shall be held ever in readiness to be used, not for prosecutorial-trial purposes, but for the purpose of having such information filtered on through, without "source disclosure", to officials who prepare "pre-sentence reports".

We earnestly say to this Court that this peril is not imaginary.

5. Both of the courts below reason that it is proper to allow extra severity in sentencing based on unconstitutional tainted information, because such information is permitted in parole revocation hearings, in Grand Jury proceedings, and in credibility impeachment of defendants who take the stand (Appendix *infra*, pp. 5A, 11A-12A). It seems self-evident that in none of these offered analogous situations is there anything remotely comparable to the danger in the sentencing situation. Police zealots are hardly likely to gather clandestine indiscriminate inventories of electronic information on the chance that this will facilitate nabbing undefined future parole violators, undefined future grand jury subjects, or undefined future defendants who may take the stand at trial. But it is very, very realistic indeed to expect the police to do as much illegal electronic snooping as they can against alleged *defined* "professional criminals" and their "friends" or "contacts" to help get heavier jail sentences against such defined unpopular individuals.

6. This case does not necessarily call for a broad general pronouncement applying the exclusionary rule to all sentencing proceedings.

But on the facts of this particular case a decision of exclusion is warranted. This is a case of adjudicatedly unlawful search by *trespassory* electronic auditing, conducted over a period of about two years, resulting in a massive collection of what the FBI itself calls "raw" information, always potentially (and here especially so) inflammatory in nature, unscreened by judicial or even by any administrative authority at a responsible level, held secret with the intensity and administrative xenophobia that have come to be legendary on the part of our valiant Federal Bureau of Investigation, yet ever overhangingly "available"

to spill over into the minds and the subliminal consciousness of sentencing Judges and pre-sentence-report-writers. Furthermore, in this Schipani case, the secret electronic information that has now availed to crush Schipani down "for sentencing purposes only", and which has been adjudicatedly condemned as intolerable to the Constitution "for trial-proof purposes", this very same suppressed and constitutionally reviled evidence, we say, has been disowned by the Government itself throughout this case as never even having been intended to see the light of any courtroom day. The Government, in short, by its own insistent and repeated averments on this record, never intended to risk a suppression of this electronic information, never intended to submit itself to "deterrence" in regard to this electronic information. Yet the genuinely learned Courts below are pleased to reason this case as one in which it is perfectly all right to relieve the Government of a sentencing-stage Fourth Amendment "deterrence" with respect to this electronic information because the poor down-trodden Government has already endured such "deterrence" at trial. Intending no disrespect to anyone, may we say that the head swims, the brain reels, at this kind of topsy-turvy judicial reasoning. Only the Pole Star of the due process clause and the allied constitutional provisions here pertinent, can keep one's constitutional gaze and pilotage steady in such a scene.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

JACOB P. LEFKOWITZ
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Attorneys for Petitioner,
Joseph F. Schipani.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 269—September Term, 1970.

(Argued November 17, 1970 Decided December 10, 1970.)

Docket No. 35161

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOSEPH F. SCHIPANI,

Defendant-Appellant.

Before:

KAUFMAN, HAYS and GIBBONS,*

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* denying appellant's motion for reduction of sentence.

Affirmed.

* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

JACOB P. LEFKOWITZ, New York, N. Y. (Abraham Glasser, on the brief), *for Appellant.*

EDWARD R. NEAHER, United States Attorney, Eastern District of New York (David G. Trager, Assistant United States Attorney, on the brief), *for Appellee.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of New York denying a motion under Rule 35 of the Federal Rules of Criminal Procedure, for reduction of sentence imposed upon appellant after conviction for tax evasion under 26 U.S.C. § 7201 (1964).

The appeal raises a single issue; is it proper for a judge in deciding upon a sentence to use evidence which has been excluded from trial because it was obtained in violation of the Fourth Amendment.

Appellant's first conviction was vacated and the case remanded to the district court for a new trial on the ground that certain evidence introduced by the Government might have been acquired by unlawful wiretapping. *Schipani* v. *United States*, 385 U.S. 372 (1966). On the second trial, the questioned evidence was excluded but appellant was again convicted. His conviction was affirmed by this court, *United States* v. *Schipani*, 414 F.2d 1262 (2d Cir. 1969), cert. denied, 397 U.S. 922 (1970). Appellant was sentenced to three years imprisonment on each of the five counts of which he was convicted, the sentences to run concurrently. In addition, he was fined $2,500 on each count for a total of $12,500.

Opinion of Court of Appeals, by Hays, J.

Appellant moved under Rule 35 of Federal Rules of Criminal Procedure for a reduction of sentence. In denying this motion Judge Weinstein, who had presided at appellant's trial and had fixed the sentence, conceded that the prison sentence was "far longer than would be expected in a routine tax case," and stated that the primary reason for the severity of the sentence was the judge's conclusion that appellant was a "professional criminal." The judge acknowledged that this conclusion was based on information obtained from the excluded wire taps which established, the judge said, that defendant was "a criminal figure, and that his undeclared income was the proceeds of organized crime." Judge Weinstein raised, *sua sponte*, the question of the propriety of using the excluded evidence for the purpose of determining the sentence. He decided that use of the evidence was proper. We agree and affirm the denial of the Rule 35 motion.

A sentencing judge's access to information should be almost completely unfettered in order that he may "acquire a thorough acquaintance with the character and history of the man before [him]." *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir. 1969), cert. denied, — U.S. — (1970).

> "His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly

applicable to the trial." (*Williams* v. *New York*, 337 U.S. 241, 247 (1949) (footnote omitted).)

This policy permits the broad acceptance of hearsay in the sentencing procedure. See, e.g., *Williams* v. *Oklahoma*, 358 U.S. 576 (1959).

In the present case the accuracy of the excluded evidence was not questioned either at sentencing or at the hearing of the motion which is here appealed. The information obtained by the wire taps was highly relevant to the character of the sentence to be imposed.

The appellant urges that the rule providing for exclusion in certain proceedings of evidence obtained in violation of the Fourth Amendment requires the rejection of the wiretap evidence at sentencing.

The purpose of the exclusionary rule is, of course, to discourage unconstitutional acts by law enforcement officials. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The issue here is whether the exclusionary rule ought to be extended to include sentencing procedures.

We believe that applying the exclusionary rule for a second time at sentencing after having already applied it once at the trial itself would not add in any significant way to the deterrent effect of the rule. It is quite unlikely that law enforcement officials conduct illegal electronic auditing to build up an inventory of information for sentencing purposes, although the evidence would be inadmissible on the issue of guilt.[1]

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[1] In the case of *Verdugo* v. *United States*, 402 F.2d 599 (9th Cir. (1968)), a divided panel decided that the exclusionary rule was applied where evidence was illegally seized to enhance the possibility of a heavier sentence after the basic investigation had been completed. As Judge Weinstein noted the *Verdugo* case presents quite a different situation from that now before us. We need not now pass upon the question of whether evidence ought to be excluded where it has been seized under the conditions presented in *Verdugo*.

It is this weakness in deterrent force which has led, as Judge Weinstein pointed out in his thorough opinion to the holdings that such evidence may be considered by a parole board in revoking parole, *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970), that it is admissible in grand jury proceedings, *United States* v. *Blue*, 384 U.S. 251, 255, n. 3 (1966), that defendants other than those whose property has been unlawfully seized do not have the benefit of the rule, *Alderman* v. *United States*, 394 U.S. 165 (1969), and that the illegally seized evidence may be used to impeach the credibility of a criminal defendant who has made untruthful assertions at trial on his direct case, *Walder* v. *United States*, 347 U.S. 62 (1954).

Where illegally seized evidence is reliable and it is clear, as here, that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence.

Affirmed.

Opinion of Sentencing Judge, Weinstein, J.

United States District Court

Eastern District of New York

63 CR 237

United States of America,

Plaintiff,

—against—

Joseph F. Schipani,

Defendant.

Appearances:

Edward Neaher,
United States Attorney for the
Eastern District of New York
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David G. Trager, Esq.,
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Attorney for Defendant

Opinion of Sentencing Judge, Weinstein, J.

WEINSTEIN, *D.J.*:

The defendant has moved, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for reduction of the sentence imposed by this Court upon his conviction for tax evasion. 26 U.S.C. § 7201. On the facts, and in the exercise of discretion, this motion would have been denied out of hand were a troublesome question of law not posed: in imposing sentence may the court consider facts and inferences drawn from illegally obtained evidence suppressed at trial? For the reasons below, we hold that in some cases, including this one, such evidence may be utilized in sentencing.

I. FACTS

Following reversal of the defendant's conviction (*Schipani* v. *United States*, 385 U.S. 372 (1966)), a motion to suppress illegally obtained wiretap evidence was granted. *United States* v. *Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968). After a second trial, the defendant was convicted on the basis of untainted evidence. 293 F. Supp. 156 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, — U.S. — (1970). The same judge who presided at the suppression hearing imposed sentence.

In deciding upon a sentence the Court considered data introduced at the hearing on the motion to suppress but excluded at the trial. Illegal wiretapping of conversations involving the defendant and his associates established that the defendant was a criminal figure, and that his undeclared income was the proceeds of organized crime. *United States* v. *Schipani*, 289 F. Supp. 43, 46, 47, 48 (E.D.N.Y. 1968).

Defendant was sentenced to three years' imprisonment on each count, to run concurrently. 18 U.S.C. § 4208(a)(2). In addition, a committed fine of $2,500.00 was imposed on each of the five counts, for a total of $12,500.00.

II. BASES FOR SENTENCE

This sentence was the maximum that could be imposed consistent with due process after the second trial. *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). The jail term was far longer than would be expected in a routine tax case. *See, e.g.*, Craig, Sentencing in Federal Tax Fraud Cases, 49 F.R.D. 97 (1970). A primary reason for severity was the court's conclusion that the defendant was a "professional criminal." ALI, Model Penal Code § 7.03(2)(b) (P.O.D. 1962). *See* Wechsler, Sentencing, Correction, and the Model Penal Code, 109 U. Pa. L. Rev. 465, 480-83 (1961); Turnbladh, A Critique of the Model Penal Code Sentencing Proposals, 23 Law & Contemp. Problems 544, 546-47 (1958).

In deciding upon a sentence appropriate to an individual defendant, a variety of needs must be considered. *Williams* v. *New York*, 337 U.S. 241, 246 (1949); *United States* v. *Mitchell*, 392 F.2d 214 (2d Cir. 1968). Among them are the possibilities of rehabilitation, general or specific deterrence, protection of potential victims by incapacitating socially dangerous offenders, and maintenance of respect for legal norms. *See* ABA, Standards Relating To Sentencing Alternatives and Procedures, 62-63 (Approved Draft, 1968); L. Empey, Alternatives to Incarceration, 1-6, 70 (1967); Advisory Council of Judges of the National Probation and Parole Association, Guides for Sentencing, 1-5 (1957); Ohlin & Remington, Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice, 23 Law & Contemp. Problems, 495, 496-99 (1958); Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821-25 (1968). A sentence reflects a prediction of future events based largely upon the defendant's past and the court's sociological conceptions.

As much reliable data as possible on the background of

the individual defendant is essential to any intelligent choice among the many available alternatives. "The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it." *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir. 1965). Any information which may lead to a better understanding of the needs of the defendant and of society may, and should, within the limitations of due process, be considered. ABA, Standards Relating to Probation, 34-39 (Tent. Draft, 1970); *Williams* v. *Oklahoma*, 358 U.S. 576 (1959); *Gollaher* v. *United States*, 419 F.2d 520, 530 (9th Cir. 1969); *Heidrich* v. *United States*, 373 F.2d 540 (5th Cir. 1966).

Recognizing the necessity for unfettered access to information by the sentencing judge, courts have regularly upheld the propriety of wide-ranging presentence investigations and reports. As the Supreme Court remarked, "[t]here are no formal limitations on [presentence reports'] contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged." *Gregg* v. *United States*, 394 U.S. 489, 492 (1969). *See also, e.g., Williams* v. *New York*, 337 U.S. 241 (1949); *United States* v. *Doyle*, 348 F.2d 715 (2d Cir. 1965).

Fairness, accuracy, and procedural due process do limit the sources which may be considered by the sentencing judge. *See, e.g., Townsend* v. *Burke*, 334 U.S. 736 (1948); *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969); *Haller* v. *Robbins*, 409 F.2d 857 (1st Cir. 1969). *See generally* Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821 (1968). But such restrictions are designed to protect the integrity of the sentencing procedure rather than the legality of earlier stages of the prosecution.

The broad acceptance of hearsay presents a striking example of the scope of presentence investigations and the

quality of materials which may be considered by the sentencing judge. *See, e.g., Williams* v. *Oklahoma*, 358 U.S. 576 (1959); *Davis* v. *United States*, 179 F.2d 640 (9th Cir. 1950). Limits on the use of hearsay at sentencing depend solely upon assessment of probative force. *United States* v. *Doyle*, 348 F.2d 715, 720 (2d Cir. 1965). *But cf. United States* v. *Rao*, 296 F. Supp. 1145, 1148 (S.D.N.Y. 1969) (hearsay indicating defendant's underworld connections does not constitute a predicate for punishment).

In the instant case the questioned evidence consists largely of admissions by the defendant and declarations against penal interest by his associates; its probative value is high, and even its status as excludable hearsay is questionable. *See, e.g.*, 4 J. Wigmore, Evidence § 1048 (3d ed. 1940); 5 *Id.* §§ 1361, 1476, 1477; 6 *Id.* § 1766; Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 331-34, 339-43, 385-87 (1969); C. McCormick, Handbook of the Law of Evidence §§ 239, 255 (1954); *Donnelly* v. *United States*, 228 U.S. 243, 277 (1913) (Holmes, J. dissenting). The accuracy of these out-of-courts statements, and of the inferences which may readily be drawn from them, was not questioned either at allocution or at the hearing on the motion to reduce sentence. It was therefore appropriate to accord them substantial weight in the sentencing decision unless they should not have been considered because of factors not relating to probative force.

III. APPLICATION OF EXCLUSIONARY RULE

A. *Purposes of Exclusionary Rule in Fourth Amendment Cases*

The primary purpose of the exclusionary rule in the case of Fourth Amendment violations is to discourage unconstitutional acts outside the courtroom by law enforcement officials. It is assumed that illegal searches and seizures will not be undertaken if they will have no meaningful effect. *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Weeks* v. *United States*, 232 U.S. 383 (1914); *Pizzarello* v. *United States*, 408 F.2d 579, 586 (2d Cir. 1969) (civil case); J. Maguire, Evidence of Guilt § 5.02 (1959); B. J. George, Constitutional Limitations on Evidence in Criminal Cases 39-42 (1966).

Since the exclusionary rule has a pragmatic orientation, it is to be expected that it will not be unnecessarily applied. And, in fact, there are a number of well recognized instances permitting reliance upon evidence obtained in violation of the Fourth Amendment.

Illegally seized evidence may be considered by a parole board in deciding to revoke parole. *United States ex rel. Sperling* v. *Fitzpatrick*, — F.2d — (2d Cir. 1970). The similarity of functions between a sentencing court and a parole board is apparent. As is the case with the parole board, "[t]o apply the exclusionary rule would tend to obstruct . . . accomplishing . . . remedial purposes" of the sentencing procedure. *Id.* at ..... A court, as well as a parole board, needs all possible information that may lead to insights into the character of the defendant. Both are vested with "the broadest discretion consistent with due process to act upon reliable evidence" in determining treatment. *Id.* at .....

Grand jury proceedings constitute a second area in which the use of illegally obtained evidence is not absolutely for-

bidden by the exclusionary rule. *United States* v. *Blue*, 384 U.S. 251, 255, n. 3 (1966); *Lawn* v. *United States*, 355 U.S. 339, 348-50 (1958). *Cf. United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964). The important protective function of the grand jury is held not to be vitiated by the use of some illegally obtained evidence so long as the government proves the defendant's guilt at the trial through untainted evidence.

A third clear exception to the exclusionary rule in Fourth Amendment cases is to be found in the continuing application of the doctrine of standing. *Alderman* v. *United States*, 394 U.S. 165 (1969). Although wiretap evidence may be the product of an unlawful search and seizure, co-conspirators or codefendants who are aggrieved "solely by the introduction of damaging evidence" "have been accorded no special standing," *Id.* at 172. Such evidence, although illegally obtained, may be used at trial without violating the deterrent policy of the exclusionary rule.

Finally evidence obtained through an unlawful search and seizure may be used to a limited extent to impeach the credibility of a criminal defendant who has made untruthful assertions at trial on his direct case. *Walder* v. *United States*, 347 U.S. 62 (1953); Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 191 (1969). *Cf. United States* v. *Guglielmini* (II), — F.2d — (2d Cir. 1970) (improperly obtained statement may be used to impeach a non-defendant witness); *United States* v. *Fox*, 403 F.2d 97, 103 (2d Cir. 1968) (*Walder* not applicable to *Miranda* situations). *But see United States* v. *Birrell*, 276 F. Supp. 798, 817 (S.D. N.Y. 1968).

B. *Exclusionary Rule in Sentencing*

Despite the analogous cases just discussed, it has been held that use of an involuntary confession at sentence war-

rants its being set aside. *United States ex rel. Brown* v. *Rundle*, 417 F.2d 282 (3d Cir. 1969); *United States ex rel. Rivera* v. *Myers*, 384 F.2d 737 (3d Cir. 1967); *Armpriester* v. *United States*, 256 F.2d 294, 297 (4th Cir. 1958) (dictum). Whatever the merits of such rulings, they are not applicable here. The original rationale for the rule against coerced confessions was lack of reliability. 3 J. Wigmore, Evidence § 822 (3d ed. 1940); Miller, The Supreme Court's Review of Hypothetical Alternatives in a State Confession Case, 5 Syr. L. Rev. 53 (1953), reprinted in Selected Writings on the Law of Evidence and Trial 847, 848 (W. Fryer ed. 1957). Thus, even when there is no coercion, courts, led—or misled—by the genesis of self-incrimination and confession rules in fears of unreliability, might exclude on sentencing illegally obtained but trustworthy confessions.

No such a historical or theoretical basis for exclusion is presented in cases arising under the Fourth Amendment, which was adopted for entirely different purposes. *See, e.g., Katz* v. *United States*, 389 U.S. 347, 350 (1967). Decisions excluding the use at sentencing of confessions obtained in violation of the Fifth Amendment are not persuasive Fourth Amendment precedents.

On principle, exclusion of illegally seized evidence on sentencing would seem to be generally unwarranted. In unlawfully searching and seizing property or conversations the government runs the risk at trial that its entire case against the defendant will be found to have been irrevocably tainted and that the evidence obtained against him—as part of a general criminal investigation—will be held inadmissible. *See, e.g., Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920); *Nardone* v. *United States*, 308 U.S. 338, 341 (1939); *United States* v. *Paroutian*, 229 F.2d 486 (2d Cir. 1962); *United States v. Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968). Absent some special situation, no appreciable increment in deterrence would result from applying

a second exclusion at sentencing after the rule has been applied at the trial itself. *Cf.* Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 389 (1964).

There are few cases which deal directly with the use of unlawfully seized evidence at sentencing. J. Maguire, Evidence of Guilt § 5.03 at 181 (1959). The only federal case we have found that is arguably on point is *Verdugo* v. *United States*, 402 F.2d 599 (9th Cir. 1968). *Verdugo* was remanded for resentence because the trial judge had relied upon a presentence report which, in turn, had been based upon illegally seized evidence.

The *Verdugo* opinion is predicated upon the fact that the search which had produced the improper evidence was conducted outside the course of the regular criminal investigation. It was undertaken, not to obtain evidence to support an indictment and conviction, but to recover contraband and thus to enhance the possibility of a heavier sentence after the basic investigation had been completed. At the time of the illegal search government agents had more than enough evidence on hand to secure a conviction of the defendant on what later became the first count of the indictment. The questioned search was made "to locate a wholesale supply of heroin. . . . [T]he agents went to Verdugo's home 'to look for the contraband and to make an arrest to get the same'." *Id.* at 612. This evidence was used as the basis for a second count of the indictment, subsequently dismissed on motion by the government after the motion to suppress had been granted.

In *Verdugo* and similar cases, if a trial judge were permitted to consider the illegally obtained evidence in passing sentence, law enforcement officials would have little to lose, but much to gain, in violating the Fourth Amendment. If their search were upheld as valid, there would be evidence sufficient to justify the additional count (and, of course, it

could be considered in sentencing on the original count). If the search were declared invalid, the Court would nevertheless be able to consider this strong evidence that the defendant was more than a mere dabbler in narcotics and was, in fact, a major trafficker. Without exclusion in such a situation, there would be no deterrence to violation of the Fourth Amendment. As the Court noted in *Verdugo*,

> "Quite different considerations would apply if the object of the search were to obtain evidence to support a single charge on which the defendant was later convicted. If the additional evidence was necessary to obtain *any* conviction at all, the danger of exclusion at trial would afford a substantial deterrent to an illegal search. If the additional evidence was *not* required for conviction, both the deterrent effect of the exclusion of illegally seized evidence of the same offense at sentencing and the incentive to conduct legal searches to obtain such evidence would appear to be minimal." *Id.* at 612, n. 21. (Emphasis in original.)

The case now before us differs substantially from *Verdugo*. The evidence excluded at trial was gathered in a basic investigation of the defendant and a number of suspected members of an organized crime syndicate. It was offered to support all of the counts of the indictment, which differed only as to the taxable years involved. It cannot be said that this information was gathered for any purpose other than the indictment and conviction of the defendant and his criminal associates, and it cannot be said that application of the exclusionary rule at sentencing in this and similar cases would have any appreciable deterrent effect.

C. *Practical Considerations*

Several practical considerations support the conclusion that the exclusionary rule should not be rigidly applied to the sentencing process. First, sentencing has traditionally been left to the discretion of the trial judge. Note, Procedural Due Process at Judicial Sentencing for Felony 821, 822-23 (1968). No statement of his reasons for imposing sentence is ordinarily required. *But cf. United States* v. *Latimer*, 415 F.2d 1288, 1291 (6th Cir. 1969). Frequently, the decision will rest on the application of unarticulated principles and factors lying at the threshold of the conscious. The oft noted wide variation in sentences suggests how powerful in advocacy is the individual judge's background.

A seriously enforced requirement that the exclusionary rule be applied in sentencing would require the judge to explain the basis of his decision and would expand appellate review far beyond its present scope. Perhaps such changes are desirable, but reforms of this nature should not be attempted by indirection. *Compare* ABA, Standards Relating to Appellate Review of Sentences, 50-53 (Approved Draft, 1968).

Another, and more serious, practical consideration weighs against the adoption of an absolute exclusionary rule in the imposition of sentences. It would be almost impossible for a district judge, who has screened proffered evidence on the motion to suppress, to banish it entirely from his mind at sentencing. This problem is similar to that raised and resolved in *United States* v. *Smith*, 337 F.2d 49, 53-54 (4th Cir. 1964), *cert. denied*, 381 U.S. 916 (1965), where the court refused to hold that a sentencing judge should disqualify himself under 28 U.S.C. § 455 from passing upon a motion under 28 U.S.C. § 2255. *See also, e.g., United States* v. *Halley*, 240 F.2d 418 (2d Cir.), *cert. denied*, 353 U.S. 967

(1957); *United States* v. *Valentino*, 283 F.2d 634 (2d Cir. 1960).

One reason for the practice of assigning the trial judge to sentencing is his familiarity with all aspects of the case. He has seen and observed the defendant; he is aware of the strengths and weaknesses of the prosecution; and he has had the opportunity to hear and evaluate any character testimony offered. Much of this knowledge might be detrimental if a fixed exclusionary rule were to be adopted in regard to sentencing. To require the trial judge to pick and choose among the items of evidence and the impressions which he has received at and before trial would be to require an unusual degree of self-awareness and control.

An impractical rule of total suppression would almost invite self-deception by a judge forced to deny that he had considered a factor that was strongly influencing his subconscious reactions. The judge's capacity to ignore such information is probably better than a juror's, but it is limited. *Cf. Bruton* v. *United States*, 389 U.S. 818 (1968); Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, 46 F.R.D. 161, 192-93 (1969). As was noted in the context of legal conclusions,

> "we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a preconceived opinion. . . ." Iredell, J. in note to *Hayburn's Case*, 2 Dall. 408, 414 (1792).

The difficulty in separating the elements of any decision is even greater when factual determinations are involved. This same argument of judicial frailty would also, of course, apply in a case such as *Verdugo* v. *United States*, 402 F.2d 599 (9th Cir. 1968), discussed *supra*, requiring some illegally obtained evidence to be excluded on sentencing. But we

ought not compound the difficulties by unnecessarily broadening the exclusionary rule.

Finally, the Federal Rules of Criminal Procedure do not require the court to permit inspection of presentence reports by defense counsel. F.R.Cr.P. 32. Even the proposed changes in Rule 32 would not mandate disclosure in all circumstances. Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts 62-63, 65-67 (1970). *See also* ABA, Standards Relating to Sentencing Alternatives and Procedures 213-25 (Approved Draft, 1968). These reports—ordinarily not part of the appellate record—usually do not specify sources. Without such disclosure, it is quite possible that in many instances the use of excludable evidence in a presentence report would pass unnoticed by the trial court, defense counsel, and appellate tribunals. Unless specific disclosure of all sources becomes the rule rather than the exception (*Good* v. *United States*, 410 F.2d 1217 (5th Cir. 1969); *United States* v. *Crutcher*, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *Baker* v. *United States*, 388 F.2d 931 (4th Cir. 1968); *United States* v. *Conway*, 296 F. Supp. 1284 (D.D.C. 1969)), any application of a general exclusionary rule to sentencing would be of little value. Moreover, the extension to post-trial situations of burdensome motions to suppress is not a step which ought to be taken unless the necessity is clear.

In the process of eliminating some of the fictions and pretensions of the law to afford more practical protections to defendants we ought not create rules inviting mendacity. *Compare United States* v. *Mitchell*, 392 F.2d 214, 218 (2d Cir. 1968) (Kaufman, concurring) ("it ill comports with the integrity of the judicial process to vacate a ruling below and remand for what will of necessity be a formalistic and meaningless imprimatur.").

IV. CONCLUSION

The purposes of the exclusionary rule, analogous cases, and practical considerations in the administration of justice all lead to the conclusion that no arbitrary rule excluding from the consideration of the sentencing judge all illegally seized evidence should be adopted. Where the evidence is reliable and it is perfectly clear that it was not gathered for the purposes of improperly influencing the sentencing judge, evidence should be accorded whatever probative value it may have. Because as complete as possible an understanding of the defendant is so important in sentencing, any exclusion of evidence should be undertaken reluctantly. No useful purpose would be served by exclusion in this case.

The motion for reduction of sentence is denied. The defendant is directed to surrender to the United States Marshal to commence service of his sentence on June 15, 1970.

So ordered.

Dated: Brooklyn, New York
June 4, 1970

JACK B. WEINSTEIN,
U.S.D.J.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1213

JOSEPH F. SCHIPANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion and order of the district court denying petitioner's motion for reduction of sentence (Pet. App. 6A-19A) are reported at 315 F. Supp. 253. The opinion of the court of appeals (Pet. App. 1A-5A) is not yet officially reported.

Opinions relating to earlier proceedings and appeals are reported as follows: (a) 362 F. 2d 825 (affirming initial conviction), vacated and remanded, 385 U.S. 372; (b) 289 F. Supp. 43 (findings and

order concerning tainted evidence); (c) 44 F.R.D. 461 (denying government motion to withdraw waiver of jury trial); (d) 293 F. Supp. 156 (findings and conclusions on merits of indictment); (e) 414 F. 2d 1262 (affirming conviction after retrial), certiorari denied, 397 U.S. 922.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1970 (Pet. App. 1A-5A). The petition for a writ of certiorari was filed on January 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court, in formulating petitioner's sentence, erred in considering information derived from an illegal electronic surveillance device tending to confirm prior information that petitioner was "a criminal figure" whose unreported income "was the proceeds of organized crime."

STATEMENT

On the occasion of his initial conviction on five counts of wilfully attempting to evade federal income taxes, petitioner was sentenced in 1965 by District Judge Rosling to three years imprisonment on each of the five counts in the indictment, and was fined $2,500 on each count, with the terms of imprisonment to be served concurrently. This conviction, at the suggestion of the Solicitor General relating to electronic surveil-

lance, was vacated by this Court, 385 U.S. 372, and, upon remand, petitioner was retried and again convicted, and again sentenced (this time by District Judge Weinstein) to three years imprisonment and a fine of $2,500 on each of the five counts, the terms of imprisonment to be served concurrently (Pet. App. 2A).

The new conviction having been affirmed and certiorari denied, 397 U.S. 922, petitioner moved in the district court for a reduction of sentence on the authority of Rule 35 of the Federal Rules of Criminal Procedure.[1] This motion was denied by the district court. (Pet. App. 19A.) In his opinion denying the motion, District Judge Weinstein considered the following question *sua sponte* (Pet. App. 7A-8A; See Pet. App. 3A):

> * * * in imposing sentence may the court consider facts and inferences drawn from illegally obtained evidence suppressed at trial? For the reasons below, we hold that in some cases, includ-

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[1] Rule 35.

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

ing this one, such evidence may be utilized in sentencing.

* * * *

In deciding upon a sentence the Court considered data introduced at the hearing on the motion to suppress but excluded at the trial. Illegal wiretapping of conversations involving the defendant and his associates established that the defendant was a criminal figure, and that his undeclared income was the proceeds of organized crime. *United States* v. *Schipani*, 289 F. Supp. 43, 46, 47, 48 (E.D. N.Y. 1968).

* * * *

This sentence was the maximum that could be imposed consistent with due process after the second trial. *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). The jail term was far longer than would be expected in a routine tax case. See, e.g., Craig, Sentencing in Federal Tax Fraud Cases, 49 F.R.D. 97 (1970). A primary reason for severity was the court's conclusion that the defendant was a "professional criminal." * * *

The present petition attacks the district court's consideration of the suppressed evidence at sentencing.

In ruling on petitioner's motion to suppress on remand from this Court, Judge Weinstein had found that the government's net worth proof was free of taint (289 F. Supp. at 61). However, the court did suppress evidence that likely sources of petitioner's unreported income included (1) petitioner's interest in the Casa Bianca Restaurant, and (2) petitioner's activities as a go-between in negotiations between labor unions and employers (289 F. Supp. at 60-61,

65). The district court found that these particular 'likely sources' had been known to the government prior to the use of an illegal listening device but that it was not clear beyond a reasonable doubt that the Internal Revenue Service's income tax investigation of these previously known leads was not "freshened up" by references thereto gleaned through the illegal listening device (289 F. Supp. at 61). The new trial was thus conducted without evidence as to those sources of income.

The pertinent aspects of the electronic surveillance, as found by the district court in ruling on the motion to suppress, were as follows. In January 1961, in the course of investigating one Michael Clemente, the F.B.I. had installed a microphone at the Prisco Travel Bureau, a front for Clemente (289 F. Supp. at 47). Thereafter, the F.B.I. monitored nine conversations in which petitioner participated and twenty-seven other conversations in which petitioner was mentioned or discussed (289 F. Supp. at 47). The information thus obtained "confirmed the F.B.I.'s belief that [petitioner] was intimately associated with many of the top figures in the Brooklyn underworld and revealed several of his current illicit activities". The district court found that the F.B.I. had been compiling information on petitioner since 1958 and that an F.B.I. report dated October 10, 1960, had described petitioner as "one of the most influential and powerful figures in the New York underworld" and had referred to petitioner's reputed interest in the Casa Bianca Restaurant. An earlier F.B.I. report had referred to petitioner's reputed control of an associa-

tion of private carting companies (289 F. Supp. at 46-47, 61). In evaluating the information illegally acquired from the Prisco surveillance, the district court found, as noted, that it tainted only the specific evidence about sources of income, but did not taint the tax investigation generally, since *inter alia*, "Most of the information obtained from this source was already known" (289 F. Supp. at 61, 65). The district court characterized the illegally acquired information as "comparatively minor leads" (289 F. Supp. at 65). And, as noted, the court of appeals affirmed these conclusions and this Court denied certiorari.

ARGUMENT

The validity of petitioner's sentence is not impaired by the fact that the district court considered information acquired in 1961 by illegal means, which corroborated earlier F.B.I. reports attributing to petitioner various sources of legal and illegal income and identifying him as an influential and powerful underworld figure. As noted by the district court, all the government's data relating to the illegal surveillance was "freely revealed" by the government (289 F. Supp. at 45), and the accuracy of the illegally monitored conversations, as well as of the justifiable inferences therefrom, has never been denied by petitioner (Pet. App. 10A).

As noted by the court of appeals (Pet. App. 5A) and by the district court (Pet. App. 11A-12A), there are sound precedents in the decisions of this and other courts for withholding application of the exclusionary rule in cases where the objective of deter-

rence can be served only in a speculative and unverifiable manner. The courts below have correctly concluded that this is such a case. They have also properly observed that this case justifies no suggestion that the illegal search was motivated by any desire to amass evidence of aggravated criminality calling into play statutory provisions for an enhanced sentence, as was the case in *Verdugo* v. *United States*, 402 F. 2d 599 (C.A. 9).

Before the surveillance began the government already possessed substantial background reports of petitioner's status as an important professional criminal,[2] and there is no basis for inferring that such an elaborate electronic surveillance program was established with any purpose of bolstering that information

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[2] Petitioner's assertion (Pet. 6-7) that in the first trial Judge Rosling accepted the government's proofs that petitioner had "likely sources" of income in the form of the Casa Bianca Restaurant and from go-between services in labor relations, but rejected the government's proof of "illegal activities" as a "likely source" does not wholly explain the context and nature of Judge Rosling's rulings. These rulings were entered in connection with determination of guilt and do not indicate what background report later entered into Judge Rosling's sentence. He ruled that, in the absence of corroborating evidence, the government had not proved "beyond a reasonable doubt" that petitioner had made oral preindictment admissions to government agents that he was engaged in "lucrative illegitimate activities." It is at once obvious that Judge Rosling's ruling was made in the context of trial evidence, which excludes hearsay, however cogent. See Appendix to Petition for a Writ of Certiorari, pp. A20, A56, *Schipani* v. *United States*, No. 504, Oct. Term 1966. Judge Rosling recited quantities of evidence indicating petitioner's interest in the Casa Bianca Restaurant and his go-between services in labor relations (*Ibid.*, A51-A55).

looking toward some future sentence to be imposed on petitioner on some as yet unidentified criminal charge. As noted by the district court (289 F. Supp. at 47), this petitioner was not even the subject of the electronic surveillance which picked up information about him, and it now appears that he would have no standing to object to most of what it revealed, *i.e.*, conversations in which he did not participate. *Alderman* v. *United States*, 394 U.S. 165 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

No. 1813

OCTOBER TERM 1970

JOSEPH F. SCHIPANI,

Petitioner.

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

This reply is needed because the Brief in Opposition proposes a drastic re-framing of the certiorari issue here involved, disregarding what the parties litigated and what both of the Courts below explicitly decided in this case. The Government is now asking the Court to deny certiorari on a supposed issue structure which neither the parties nor the Courts below ever waged at all.

The only issue litigated and decided in the Courts below was whether petitioner Schipani was unconstitutionally sentenced in this income tax case because in imposing sentence the District Judge considered facts and inferences drawn from illegally obtained electronic-eavesdrop evidence which had been suppressed at trial. The sentencing Judge expressly stated that, in imposing the exceptionally severe sentence in this case, he had considered the suppressed electronic materials. The Court of Appeals, in affirming and approving the sentencing Judge's use of this suppressed illegal evidence, stated the issue as follows (App. Pet. Cert. 2A):

> "The appeal raises a single issue: is it proper for a judge in deciding upon a sentence to use evidence which has been excluded from trial because it was obtained in violation of the Fourth Amendment."

And the concluding words in the opinion of the Court of Appeals were (id. 8A):

> "Where illegally seized evidence is reliable and it is clear, as here, that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence."

In arriving at their aforesaid respective conclusions that it was constitutionally permissible in this case to consider the illegally seized evidence in imposing sentence, both of the Courts below made a detailed analysis of the constitutional merits of using such evidence for such purpose. Likewise, the parties briefed and argued in detail the merits of this constitutional issue in both Courts below.

Thus, the entire and the sole litigational framework, the entire and the sole decisional framework and decisional result, in both of the Courts below, were in terms of (1) the judicially-declaredly operative "*constitutional fact*" that the illegal electronic evidence was the conscious and express judicial basis for imposing the exceptionally heavy sentence in this case and, (2) the dispositive decisional fact that both Courts below were being called upon to decide as to the constitutional permissibility of using such illegal evidence for such sentencing purpose. Both of these Courts decided such was constitutionally permissible; and both of these Courts rendered decision in favor of such constitutional permissibility on the basis of their examination of the problems of constitutional doctrine involved. Nothing else was litigated or decided in the proceedings below.

• • • • •

Now, however, in the Brief in Opposition, it is being suggested, for the first time in this case, that the judgment here sought to be reviewed is sustainable, and needs no certiorari review, for the sole reason that:

> "• • • [I]nformation derived from an illegal electronic surveillance device *tend[ed]* to *confirm prior information* that petitioner was 'a criminal figure' whose unreported income 'was the proceeds of organized crime'" (Br. Opp., p. 2) (Emphasis supplied).
>
> • • • • •
>
> "The validity of petitioner's sentence is not impaired by the fact that the district court considered information acquired in 1961 by illegal means, which *corroborated earlier F.B.I. reports* attributing to petitioner various sources of legal and illegal income and identifying him as an influential and powerful underworld figure • • •" (Br. Opp. p. 6) (Emphasis supplied).
>
> • • • • •
>
> "*Before the surveillance began the government already possessed substantial* background reports of petitioner's status as an important professional criminal, • • •" (Br. Opp. p. 7) (Emphasis supplied).

The Government thus is now suggesting, for the first time, that, even though the sentencing Judge expressly used the illegal electronic evidence and expressly justified doing so only after extensive examination as to the constitutional-doctrinal merits of doing so—in all of which the Court of Appeals expressly approved the sentencing Judge's decisional procedures and expressly ratified his conclusions in this matter—nevertheless now, the Government urges, this Court ought to reject our certiorari prayer on the sole ground that *the F.B.I.* assertedly had substantial unfavorable information about petitioner before the illegal electronic surveillance was started.

The Brief in Opposition is noteworthy for its total silence as to the important issues of constitutional analysis explicitly considered and decided by both of the Courts below. Instead, the Brief in Opposition urges, in effect, that it was alright for petitioner Schipani to be sentenced on the basis of the illegal evidence simply because the *F.B.I.* anteriorly knew or believed—or says it knew or believed—that petitioner was a bad man.

The Brief in Opposition does not even venture to suggest that the *sentencing Judge himself relied* on this anteriorly anterior knowledge or opinion of the *F.B.I.* True, the Brief in Opposition does point out that the sentencing Judge knew about the F.B.I.'s anterior (pre-electronic) information (Br. Opp. pp. 3-6). But, we repeat, the Brief in Opposition does not contend (and could not) that the sentencing Judge *judicially noted* any such anterir F.B.I. information in sentencing petitioner Schipani.

The necessary argumentative thrust of the Brief in Opposition is that, in view of the mere existence of the anterior (pre-electronic) F.B.I. information, it does not matter that the sentencing Judge *expressly noted* the subsequently obtained illegal electronic evidence.

In other words, the Brief in Opposition asks this Court now merely to infer or guess (now for the first time in the within proceedings on petition for certiorari) that despite the expressly-judicially-declared "constitutional fact" of record in both of the Courts below that the sentencing Judge used the suppressed illegal evidence, there is now needed a judicial emendation of the record by this Court to make it appear that both of the Courts below did not really mean what they said when they judicially treated and decided this case as being structured on the "constitutional fact" that the sentencing Judge did what he did here (in imposing an exceptionally heavy sentence) because of what he had learned from the suppressed illegal electronic evidence.

The Government is now asking this Court to re-write the certified record below, and to do so on the basis of sheer judicial guesswork supported by nothing more than the ipse dixit of the authors of the Brief in Opposition as spokesmen for the ever-hopeful keepers of the files of the F.B.I.

In the District Court proceedings in 1968-1969 on petitioner Schipani's motion to suppress electronic evidence—i.e. when the Government brought this case on for retrial after this Court had vacated Schipani's first conviction for electronic taint, 395 U.S. 372—the Government introduced in evidence several exhibits consisting of the pre-electronic F.B.I. reports. Since it is these pre-electronic reports to which the Government is referring in its within Brief in Opposition (pp. 5-6), it is necessary to note just what those pre-electronic F.B.I. items were.

In Schipani's petition for certiorari, no. 1492 Misc., October Term 1969, cert. denied, 397 U.S. 922, the record materials comprising these pre-electronic F.B.I. items were before this Court (the latter No. 1492 Misc. of October Term 1969 was Schipani's petition for certiorari seeking review of his second conviction and of the lower Courts' determination that said second conviction was not electronically tainted). In the 1968-1969 suppression proceedings which eventuated in the latter no. 1492 Misc. (October Term 1969), the pre-electronic F.B.I. reports in the record consisted of (1) Government's Exhibit 9, being the F.B.I. report of October 10, 1968, mentioned on p. 5 of the Brief in Opposition herein—see the record in no. 1492 Misc. October Term 1969, transcript of May 8, 1969 (before Judge Weinstein), testimony of F.B.I. agent McShane, pp. 406-409, also testimony of Department of Justice attorney Philip Wilens, id, pp. 476-479; and (2) Government Exhibits 10A to 10G inclusive, consisting of F.B.I. reports preceding the latter F.B.I. report of October 10, 1968 (Exhibit 9 supra), received in evidence in the 1968-1969 suppression proceedings before Judge Weinstein during the testimony of F.B.I. agent McShane, Transcript of May 8, 1969, pp. 411-412.

The foregoing 1968-1969 Exhibits 9 and 10A-10G are the entirety, apparently, of the pre-electronic F.B.I. reports containing information about Schipani, i.e., the pre-electronic F.B.I. reports which the Government is now asking this Court to treat as in effect wiping out the decisional impact of the judgment here sought to be reviewed. (It is interesting to note that in its Brief in Opposition herein the Government does not bother to cite to this Court the Exhibit numbers or other record-identifying citations of these now-being-touted pre-electronic F.B.I. reports (Br. Opp. 5-6 and passim). It appears that all of those pre-electronic F.B.I. reports, which were received in evidence at the 1968-1969 suppression proceedings before Judge Weinstein were sealed by Judge Weinstein at the Government's request. Our own files at present contain, out of all of those F.B.I. exhibit items (Exhibits 9 and 10A-10G), only an item dated June 5, 1969 bearing Clerk's exhibit no. 10B plus an unmarked item dated February 4, 1969. We do not have in our possession, and have not had, since the time of the aforesaid 1968-1969 suppression proceedings before Judge Weinstein, any copy of either the primary Exhibit 9 (F.B.I. report of October 10, 1969), or of the earlier-dated F.B.I. reports received in evidence as Exhibits 10A and 10C to 10G.

It is these last cited pre-electronic F.B.I. reports on which the Government is pitching its entire presentation in the present Brief In Opposition. These F.B.I. reports consist of the typical medley of raw, undigested, unattributed F.B.I. investigative "information". These pre-electronic F.B.I. reports are a far cry from the suppressed, illegal electronic logs whose sentencing significance the Government is now trying to downgrade.

Before this Court should decide to deny certiorari in this case—if such denial is going to turn on the Government's latest contention that the illegal electronic logs do

not matter in view of the pre-electronic F.B.I. reports—the Court ought, we submit, to request the Government to make available to the Court copies of the aforesaid sealed Exhibits 9 and 10A-10G, and of the sealed electronic logs, from the 1968-1969 record in No. 1492 Misc. Oct. Term 1969.

CONCLUSION

It is respectfully submitted that the petition for certiorari herein should be granted; and that before denying the petition the Court should request the Government to make available the sealed papers mentioned in our last preceding paragraph, *supra*, if such possibly forthcoming denial of certiorari may turn on the Government's contention in the Brief in Opposition that the use of the suppressed illegal electronic evidence for purposes of sentencing was not constitutionally aggrieving in the light of the existence of the pre-electronic F.B.I. reports.

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Dated: March 12, 1971